PREME COURT, U. S.
FEB 5 1968
JOHN F. DAVIS, CLERK

No. 31, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

REPLY BRIEF OF MORTON INTERNATIONAL, INC. TO BRIEF OF STATE OF UTAH IN OPPOSITION TO MOTION OF MORTON INTERNATIONAL, INC. FOR LEAVE TO INTERVENE

L. M. MCBRIDE
FRANK A. WOLLAEGER
110 North Wacker Drive
Chicago, Illinois 60606

MYER FELDMAN
MARTIN JACOBS
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Counsel for Morton International, Inc.

MCBRIDE, BAKER, WIENKE & SCHLOSSER
GINSBURG AND FELDMAN
Of Counsel

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

INDEX

Page

Reply Brief of Morton International, Inc. to Brief of State of Utah in Opposition to Motion of Morton International, Inc. for Leave to Intervene 1

Argument 1

I. Morton Is Indispensable under the Criteria Established by the Court and Utah's "Practical Considerations" Are Irrelevant 1

II. Neither the Great Salt Lake Lands Act Nor the Doctrine of Sovereign Immunity Is a Bar to Morton's Intervention 9

III. The Joinder of Citizens of Utah as Parties Defendant Would Not Divest the Supreme Court of its Jurisdiction over the Case 12

Conclusion 13

CITATIONS

CASES:

Arizona v. *California*, 298 U.S. 558 (1936) 11

Barney v. *Baltimore*, 73 U.S. (6 Wall.) 280 (1868) 2

California v. *Southern Pacific Co.*, 157 U.S. 229 (1895)...2, 5, 8, 12

California v. *United States*, 180 F.2d 596 (9th Cir. 1950) 10

Elmendorf v. *Taylor*, 23 U.S. (10 Wheat.) 152 (1825) 3

Ex parte Collett, 337 U.S. 55 (1949) 9

Franz v. *Buder*, 11 F.2d 854 (8th Cir. 1926), *cert. denied*, 273 U.S. 756 (1927) 8

Humble Oil and Refining Co. v. *Sun Oil Co.*, 190 F.2d 191 (5th Cir. 1951) 5

Kendig v. *Dean*, 97 U.S. 423 (1878) 2

Lubin v. *Chicago Title and Trust Co.*, 260 F.2d 411 (7th Cir. 1958) 4

Mallow v. *Hinde*, 25 U.S. (12 Wheat.) 193 (1827) 3, 5

McArthur v. *Rosenbaum Co. of Pittsburgh*, 180 F.2d 617 (3d Cir. 1950) 5

McShan v. *Sherrill*, 283 F.2d 462 (9th Cir. 1960) 2, 6

Page

Minnesota v. *Northern Securities Co.*, 184 U.S. 199 (1902) .. 2

Oklahoma v. *Texas*, 258 U.S. 574 (1922) 10, 12

Payne v. *Hook*, 74 U.S. (7 Wall.) 425 (1869) 4

Shields v. *Barrow*, 58 U.S. (17 How.) 130 (1855) 2, 5, 7

Texas Co. v. *Wall*, 107 F.2d 45 (7th Cir. 1939) 4

Union Pacific Railroad Co. v. *United States*, 99 U.S. 700 (1879) 9

Union Mill & Mining Co. v. *Dangberg*, 81 F. 73 (C.C.D. Nev. 1897) 5

Washington v. *United States*, 87 F.2d 421 (9th Cir. 1936) 2, 11

Western Union Telegraph Co. v. *Pennsylvania*, 368 U.S. 71 (1961) 2

Williams v. *Bankhead*, 86 U.S. (19 Wall.) 563 (1874) 2

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment V 9

STATUTES:

Act of June 3, 1966, 80 Stat. 192, as amended by Act of August 23, 1966, 80 Stat. 349 .....9, 10, 12

Utah Code Annotated, Section 78-11-9 11

MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 19 7

Moore's Federal Practice 3A, para. 19.05[1] 7

Reed, "Compulsory Joinder of Parties in Civil Actions," 55 Mich. Law Rev. 327 (1957) 6

No. 31, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

REPLY BRIEF OF MORTON INTERNATIONAL, INC. TO BRIEF OF STATE OF UTAH IN OPPOSITION TO MOTION OF MORTON INTERNATIONAL, INC. FOR LEAVE TO INTERVENE

This brief is submitted by MORTON INTERNATIONAL, INC. (hereinafter referred to as "Morton") in reply to the brief filed by the State of Utah in opposition to Morton's motion for leave to intervene and answer. Since the brief filed by the United States supports Morton's position and urges the Court to grant Morton's motion, this brief, in addition to the reply to Utah, contains merely a short comment with respect to the argument on jurisdiction set forth in Part II of the United States' brief.

ARGUMENT

I. MORTON IS INDISPENSABLE UNDER THE CRITERIA ESTABLISHED BY THE COURT AND UTAH'S "PRACTICAL CONSIDERATIONS" ARE IRRELEVANT

Most of Utah's brief is devoted to an attempt to show various dire results which the granting of Morton's motion would cause. All of this is irrelevant to the question of

Morton's indispensability. These irrelevancies have evidently been inserted to persuade the Court to disregard Morton's position, regardless of its soundness, for "practical considerations."[1] This approach is understandable only when, after even a cursory reading of the brief, it is apparent that Utah has been unable to cite a single case contrary to the controlling decisions of this Court upon which Morton relies in support of its motion.

The rules established by the Court in *Shields* v. *Barrow*, 58 U.S. (17 How.) 130 (1855), for determining the indispensability of an absent person have been adhered to and applied by this Court and lower courts without dilution to the present day.[2] When Utah states in its brief that "each case must be judged in the light of its particular facts," it is merely stating the obvious. Utah is plainly incorrect, however, when it argues that, after the Court has considered the facts, there exists no formula or criteria to be applied to determine indispensability. The whole purpose of analyzing the facts is to see whether they fall within the criteria set forth in *Shields* v. *Barrow*, *supra*, for indispensability, *i.e.* (58 U.S. at 139):

"Persons who not only have an interest in the contro-

---

[1] *E.g.*, the nature of the litigation is highly unusual; Morton's joinder would add "cumbersome complexity" to the case; there is no other forum available to determine the controversy if the case is dismissed for lack of jurisdiction; the legislative and executive branches of both Governments desire to settle the controversy without private parties.

[2] *Barney* v. *Baltimore*, 73 U.S. (6 Wall.) 280 (1868); *Williams* v. *Bankhead*, 86 U.S. (19 Wall.) 563 (1874); *Kendig* v. *Dean*, 97 U.S. 423 (1878); *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199 (1902); *Washington* v. *United States*, 87 F. 2d 421 (9th Cir. 1936); *McShan* v. *Sherrill*, 283 F. 2d 462 (9th Cir. 1960); *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961).

> versy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The facts in this case bearing on Morton's indispensability are set forth in Morton's motion and show that a substantial portion of the lands, title to which is in dispute in this litigation, is claimed by Utah (on the theory that it owns the bed of the Lake of which these lands are allegedly a part), by the United States (under the common law doctrine of reliction and the Basart Doctrine), and by Morton (under the common law doctrine of reliction and by reason of its claim of non-navigability of the Lake). In this situation the present parties are seeking an adjudication of Morton's interest as well as their own. These are the only facts to be considered in determining Morton's indispensability, and they are not disputed by Utah.

In the light of these particular facts it is clear that the cases cited by Utah actually support Morton's position. In *Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152 (1825), plaintiff brought a bill in equity to obtain a conveyance of lands. With respect to the lands in question plaintiff was a tenant in common with a person not joined as a party. The Court held that their respective rights as tenants in common were each independent of the other and that, therefore, the matter could be adjudicated between the plaintiff and defendant without injuring the absent party. *Elmendorf* was distinguished and limited to its facts by the Court in *Mallow* v. *Hinde*, 25 U.S. (12 Wheat.) 193 (1827), which stated (25 U.S. at 198):

> "In this case [*Mallow* v. *Hinde*], the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those

> not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties."

Payne v. *Hook,* 74 U.S. (7 Wall.) 425 (1869), involved an action by the plaintiff to compel the defendant, as administrator of her brother's estate, to account and pay over to the plaintiff her rightful share of the estate. Other distributees of the estate, not before the court, were citizens of Missouri and if joined as plaintiffs would have ousted the trial court of its diversity jurisdiction since the defendant was also a citizen of Missouri. The Court held that these distributees were not indispensable since they were each entitled to a portion of the estate, but in no instance the same portion; therefore, their interests were severable and not overlapping or conflicting.

Obviously, *Elmendorf* and *Payne* lend no support to Utah's position since the absent parties were, what are now classified as, necessary parties having interests in the subject matter, but whose interests would not be adversely affected by a decree. Each of the other cases cited by Utah in which the court has not required joinder of interested absent persons involved necessary parties rather than indispensable parties.[3] A court has discretionary power not

---

[3] *Texas Co.* v. *Wall,* 107 F.2d 45 (7th Cir. 1939). In an action by an oil and gas lessee to enjoin the entry of third parties, the lessor was not an indispensable party as the validity of his title would not be affected.

Lubin v. *Chicago Title and Trust Co.,* 260 F.2d 411 (7th Cir. 1958). An action by beneficiaries to surcharge the trustee with loss of trust income, or in the alternative, for damages. The court held that the settlor and the executrix of the estate of the settlor were

(continued on next page)

to require the joinder of a necessary party if such joinder is not feasible or would deprive the court of jurisdiction. *Mallow* v. *Hinde, supra; Shields* v. *Barrow, supra.*

Utah's attempt to distinguish this case from *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895), is patently fruitless. That was an action to quiet title in the State of California to lands as against the claims of the Southern Pacific Co. In that case, as in this litigation, a decree could not bind absent persons. As Utah correctly points out, to de-

---

(continued from preceding page)

not indispensable parties although they had an interest in the subject matter of the litigation because a decree could be entered that would do justice to the beneficiaries and the trustee without affecting the rights of the settlor or the executrix.

Union Mill & Mining Co. v. *Dangberg*, 81 F. 73 (C.C.D. Nev. 1897). An action by one tenant in common to restrain the infringement of his water rights. The court held that the other tenant in common was not an indispensable party as the tenants' interests were several there merely being a unity of possession.

Humble Oil and Refining Co. v. *Sun Oil Co.*, 190 F.2d 191 (5th Cir. 1951). An action by Sun Oil Co. to establish title and recover possession of certain leasehold estates as well as to quiet title and enjoin the defendants from interfering with Sun's use of the property. On appeal, the court stated that error was committed in allowing the State of Texas, as the common lessor, to intervene as it would introduce a new litigant who was not an indispensable party since its title was not affected and whose presence would destroy the court's diversity jurisdiction.

McArthur v. *Rosenbaum Co. of Pittsburgh*, 180 F.2d 617 (3rd Cir. 1950). An action by certain lessors for a declaratory judgment construing a lease. The court held that other lessors of another tract on which the building was located were not indispensable parties for the title to their property would not be affected by any decision in the case, their lease and the option in it would not be affected, nor would it be inequitable to proceed without their presence.

termine the rights of the Southern Pacific Co., it would have been necessary to adjudicate directly upon the rights of the City of Oakland, an absent person, since the Southern Pacific Co. derived its claim of title through Oakland, which still claimed ownership interests. Similarly in this case, to determine the rights of the United States, it will be necessary to adjudicate directly upon the rights of Morton, since Morton derives its claim of title through the United States, which still claims ownership interests in the lands claimed by Morton. As a matter of fact and law, the *California* case is indistinguishable from this case on the question of indispensability. See, also, *McShan* v. *Sherrill*, 283 F.2d 462 (9th Cir. 1960).

Assuming, *arguendo*, that for one reason or another the requirement of Morton's joinder as a party would prevent the litigation from proceeding, as is suggested by Utah, such a result has no bearing on whether or not Morton is an indispensable party.[4] In urging the Court to adopt a "practical" or "pragmatic" approach, Utah quotes at length from Professor Reed's article, "Compulsory Joinder of Parties in Civil Actions," 55 Mich. Law Rev. 327 (1957). However, except for a few ambiguous statements, Professor Reed merely urges that the courts appraise the facts carefully and pragmatically in determining whether the criteria of indispensability apply to the absent party. One factor in such determination is whether an effective decree can be framed between the parties without affecting the absent party's interest. If such is the case, and the other criteria of indispensability are not present, the absent person is merely a necessary party and not indispensable. Then the court, in its discretion, may dispense with his joinder if it

---

[4] It is Morton's position, as set forth in Parts II and III of this brief, that its required joinder would have no such effect.

would oust the court from jurisdiction. This is the manner in which most courts have approached the problem in any event, and Morton certainly has no quarrel with this proposition.[5]

When, however, after an analysis of the facts, the court has determined that the absent person is indispensable, it is mandatory that he either must be joined or the action must be dismissed regardless of the consequences to the parties. It is not a matter within the court's discretion. Thus the "practical facts" which Utah urges the Court to consider in denying Morton's motion have been uniformly and specifically rejected by this Court and lower courts. In *Shields* v. *Barrow, supra,* the Court states (58 U.S. at 146):

---

[5] As is stated in 3A *Moore's Federal Practice,* para. 19.05[1] at p. 2206:

> "The criteria of revised subdivisions (a) and (b) [Federal Rules of Civil Procedure, Rule 19] follow the criteria laid down by the Supreme Court in *Shields* v. *Barrow* and numerous other cases decided by the Supreme Court and the lower courts. "Since the Committee did not single out any line of cases nor even a single case that the revised rule was intended to overrule, revised subdivisions (a) and (b) should be read, like their antecedents were read, as substantially continuing the judicial tradition dealing with compulsory joinder that goes back to 1789. This does not mean that after evaluating the facts of a case a court may not decide the matter of joinder differently than a like case had decided it prior to 1966. But this is nothing novel. Courts were continually reappraising and differentiating earlier cases, prior to the revision of 1966; and this judicial process will continue, subject, of course, to a proper respect for stare decisis. What should be borne in mind is that the revised Rule 19 does not break with the past; and, in general, who are necessary and who are indispensable parties are those who were so classified prior to the revision of Rule 19." [Footnotes omitted]

> "This court regrets that a litigation, which has now lasted upwards of thirteen years, should have proved wholly fruitless; but it is under the necessity of reversing the decree of the Circuit Court, ordering the cause to be remanded, and the original and cross-bills dismissed."

Similarly, in *Franz* v. *Buder*, 11 F.2d 854 (8th Cir. 1926), *cert. denied*, 273 U.S. 756 (1927), the court states (11 F.2d at 857):

> "Counsel for plaintiff say to hold that such persons were indispensable parties will leave him wholly without a remedy in the premises, for the reason that they are not residents either of the State of Missouri or the State of Kansas where plaintiff resides. Such a result would not excuse the failure to join an indispensable party. . . ."

Certainly, if any such practical considerations had a bearing on indispensability, this Court would not have ignored them in *California* v. *Southern Pacific Co.*, *supra*, when it dismissed the complaint after lengthy proceedings on the merits in which the "absent" parties actually participated as *amici curiae*.

The justification for the equitable principles developed by this Court, which manditorily require the joinder of a person whose interest is inextricably bound up in the claims of the parties and will be directly affected by an adjudication, is perfectly illustrated in this case. A ruling in favor of either Utah or the United States with respect to the lands also claimed by Morton would necessarily involve a ruling on the validity of Morton's claim to title. Unless permitted to intervene, Morton will be unable to defend the validity of its claim. This is exactly the situation that the doctrine of indispensability is designed to prevent.

II. NEITHER THE GREAT SALT LAKE LANDS ACT NOR THE DOCTRINE OF SOVEREIGN IMMUNITY IS A BAR TO MORTON'S INTERVENTION

Utah devotes many pages of its brief in an attempt to develop its remarkable theory that, since Section 2 of the Great Salt Lake Lands Act[6] provides ". . . that the provisions of this Act will not affect (1) any valid existing rights or interests, if any, of any person, partnership, association, corporation or other non-governmental entity, in or to any of the lands within and below said meander line," the litigation authorized by the Act does not affect Morton's interest. Therefore, Utah argues, the Act bars Morton's intervention as a party in this litigation. Actually, the converse is true.

The above-quoted proviso in Section 2 merely states explicitly what Congress could not constitutionally do in any event. Congress cannot merely by legislative action impair a person's property rights since this would be a deprivation of property "without due process of law" prohibited by the 5th Amendment. *Union Pacific Railroad Co.* v. *United States,* 99 U.S. 700 (1879). Furthermore, if the Act could be construed to deny a person the right to defend the validity of his title through intervention, then the Act's constitutionality would be highly doubtful. Such a construction would be improper.

There is no ambiguity in the Act which justifies resort to legislative history. *Ex parte Collett,* 337 U.S. 55 (1949). Accordingly, the voluminous quotations in Utah's brief from published Congressional hearings held prior to the passage of the Act serve no valid purpose. This litigation was authorized under the Act "to secure judicial determi-

---

[6] Act of June 3, 1966, 80 Stat. 192, as amended by Act of August 23, 1966, 80 Stat. 349.

nation of the right, title and interest of the United States" in the land in dispute. Since part of the land in dispute is claimed by private parties, which claims both Utah and the United States assert are invalid, such persons must of necessity be permitted to intervene or their interests and rights *will* be affected, contrary to Section 2 of the Act. The Act, therefore, clearly requires that Morton's motion to intervene be granted.

The United States has, understandably, not asserted sovereign immunity as a bar to Morton's intervention, since it is clear that this doctrine is not applicable. Sovereign immunity does not preclude the intervention of a person in litigation to defend his interest in the subject matter against the claim of a sovereign. In *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), numerous parties claiming interests in the subject matter were permitted by this Court to intervene in a dispute between Oklahoma, Texas and the United States involving ownership of the bed of the Red River. There was no statutory consent to these interventions. The rationale for permitting the intervention of dispensable parties without statutory consent was succinctly stated by the Ninth Circuit in *California* v. *United States*, 180 F.2d 596 (9th Cir. 1950), with respect to California's motion to intervene (180 F.2d at 602):

> "The Government also makes the contention that this is a suit against the Government and, there being no statute authorizing it, the Court does not have jurisdiction. The short answer to that is that the Government chose the forum in which it is seeking to quiet title to the water. The State is asserting an interest in the subject matter as absolute owner of the water, and as *parens patriae* on behalf of all of its citizens. This is a sufficient interest in the subject matter to entitle it to be heard, just as if the State were joined by the United States originally as a defendant."

See, also, *Washington* v. *United States*, 87 F.2d 421 (9th Cir. 1936).[7] The doctrine of sovereign immunity, when applicable, applies to a state, as well as a private party, in an action against the United States. *Arizona* v. *California*, 298 U.S. 558 (1936).

Even if the foregoing were not the law, Utah has, nevertheless, consented to any adverse claim by Morton in this action by reason of Section 78-11-9, Utah Code Annotated, not mentioned in Utah's brief, which statute provides:

> "Upon the conditions herein prescribed the consent of the State of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought *in any court of this state or of the United States* for the recovery of any property real or personal or for the possession thereof *or to quiet title thereto*, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien the State of Utah may have or claim on the property involved. It shall be the duty of the attorney general to represent the interests of the state in such cases. No judgment for costs or other money judgment shall be rendered against the state in any suit or proceeding which may be instituted under the provisions of this section nor shall the state be or become liable for the payment of costs of any such suit or proceeding or any part thereof." (Emphasis added)

Similarly, the United States has consented to an adverse

---

[7] In this case the court, reversing the decree, directed the trial court to permit the intervention of the States of Washington and Oregon on the ground that the order denying intervention deprived these states of any effective remedy for the adjudication of title because the United States had not consented to a subsequent suit against it.

claim against it by Morton under Section 5(b) of the Great Salt Lake Lands Act, which provides in pertinent part:

> ". . . may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section 2 of this Act. Consent to join the United States as *a* defendant to such an action is hereby given." (Emphasis added)

Clearly, the use of the term "a defendant" rather than "the defendant" encompasses the joinder of other parties defendant.

III. THE JOINDER OF CITIZENS OF UTAH AS PARTIES DEFENDANT WOULD NOT DIVEST THE SUPREME COURT OF ITS JURISDICTION OVER THE CASE

No citizen of Utah, similarly situated to Morton, has sought to intervene in this case. In anticipation, however, that there may be citizens of Utah who must be joined as indispensable parties, Utah argues that their joinder will deprive the Court of its jurisdiction on the basis of the decision in *California* v. *Southern Pacific Co., supra.* Morton disagrees with this position and concurs in the position taken by the United States in Part II of its brief for the reasons stated therein.[8]

---

[8] Since we agree with the United States that the *California* v. *Southern Pacific Co.* case is distinguishable, we have not argued an alternative approach to the alleged jurisdictional problem in this brief. We note, however, that the Court in *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), resolved any possible jurisdictional problem by taking possession of the disputed lands and appointing a receiver therefor.

CONCLUSION

For the reasons set forth in this brief and in its motion, Morton is an indispensable party and its motion to intervene should be granted.

Respectfully submitted,

L. M. McBride
Frank A. Wollaeger
110 North Wacker Drive
Chicago, Illinois 60606

Myer Feldman
Martin Jacobs
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Counsel for Morton International, Inc.

McBride, Baker, Wienke & Schlosser
Ginsberg and Feldman
Of Counsel

February, 1968

CERTIFICATE OF SERVICE

I, Frank A. Wollaeger, one of the attorneys for Morton International, Inc. and a member of the Bar of this Court, do hereby certify that copies of the foregoing Reply Brief were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D. C. 20530; the Attorney General of Utah, 236 State Capitol Building, Salt Lake City, Utah; and George E. Boss, Senior & Senior, 10 Exchange Place, Salt Lake City, Utah 84111, counsel for Great Salt Lake Minerals & Chemicals Corporation, by mailing the same to their respective offices, in accordance with Rule 33 of the Rules of this Court this 2nd day of February, 1968.

Frank A. Wollaeger
Counsel for Morton International, Inc.